No. 83-610

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

BABBITT FORD, INC., PETITIONER

*v.*

NAVAJO INDIAN TRIBE, ETC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

---

REX E. LEE
*Solicitor General*

F. HENRY HABICHT II
*Assistant Attorney General*

LOUIS F. CLAIBORNE
*Deputy Solicitor General*

EDWIN S. KNEEDLER
*Assistant to the Solicitor General*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether the Navajo Tribe may (i) bar repossession of personal property of members of the Tribe located on Reservation land without the written consent of the purchaser or an order of the Navajo Tribal Court, and (ii) provide that any person who violates this prohibition is liable in damages.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:

Treaty, statutes and rules: Page



Miscellaneous:

# In the Supreme Court of the United States

OCTOBER TERM, 1983

---

No. 83-610

BABBITT FORD, INC., PETITIONER

*v.*

NAVAJO INDIAN TRIBE, ETC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

---

This brief is filed in response to the Court's invitation.

### STATEMENT

1. Petitioner Babbitt Ford is an Arizona corporation that owns and operates car dealerships in Page and Flagstaff, Arizona. Each dealership is located in close proximity to the Navajo Indian Reservation, and each derives a substantial portion of its income from sales to members of the Navajo Tribe. Pet. App. 3.

Petitioner states (Pet. 3) that it sells approximately 70 vehicles per month—approximately 50% of its total sales—to persons it believes to be residents of the Navajo Reservation. The sales contracts with Indians are entered into at the dealership, and delivery of the automobiles occurs off the Reservation. The majority of these transactions involve loan contracts that apparently provide for repossession by petitioner upon default by the purchaser. Pet. App. 3. Arizona law provides that "[u]nless otherwise agreed," a secured party "has on default the right to take possession of the collateral," and that "[i]n taking possession a secured party may proceed without judicial process if this can be done without breach of the peace" (Ariz. Rev. Stat. Ann. § 44-3149 (1967)).

However, repossession of vehicles and other personnel property from members of the Navajo Tribe on the Navajo Reservation is regulated by the Navajo Tribal Code (N.T.C.). A section of that Code in effect since 1968 provides that "[t]he personal property of Navajo Indians shall not be taken from land subject to the jurisdiction of the Navajo Tribe under the procedures of repossession" except with the written consent of the purchaser secured at the time repossession is sought, or, if the Indian refuses to give consent, "by order of a Tribal Court of the Navajo Tribe in an appropriate legal proceeding." 7 N.T.C. § 607; Pet. App. 3. On January 29, 1982, the Judges of the Navajo Tribal Courts, with the approval of the Chief Justice of the Tribe, adopted a rule to implement the latter provision.[1] The preamble to the rule states that "[t]he application of [Section 607] to non-Indian creditors has been the occasion of a great deal of liti-

[1] We have lodged a copy of the Tribal Court rule with the Clerk of this Court.

gation, most of which has been unnecessary"; that the extension of secured credit to Navajo Nation residents is "beneficial to the residents of the Navajo Nation"; and that "the protection of the rights of extenders of credit as to property used as security and the protection of the rights of consumers within the Navajo Nation" required the courts to adopt a rule for repossession which is "simple, speedy and fair."

The rule provides for the remedy of repossession to be sought by means of a "verified petition," which "may be in standardized form" or "may be informal or drafted by a creditor without counsel" (Tribal Ct. R. § 5(a) (1982)). The petition must recite the name and address of the person from whom repossession is sought; identify the property in a manner that will facilitate its seizure; describe the agreement and breach of the agreement that give rise to a right of repossession; state the balance due; and identify the "exact relief or remedy which is being sought (*e.g.*, repossession by the creditor, repossession by the police, delivery into court, damages, etc.)." § 5(b). The clerk of the court then must issue an order to the person possessing the property directing him to appear and show good legal grounds why the property should not be repossessed. A hearing is to be held no less than 5 nor more than 10 days after the order issues, subject to limited continuances. §§ 6, 7.[2]

---

[2] The Tribal Court also may order immediate repossession pending the hearing if it appears on the basis of an affidavit submitted by the petitioner that there is an immediate and likely danger that the property will be damaged, destroyed, hidden, or removed from the jurisdiction of the Tribal Court or impaired as security. In that event, the court may order the property to be held by the petiitoner either with or without posting a bond, or held under the control of the Navajo Nation or the court. § 10.

The hearing is to be informal, and the only question to be considered is whether the property is security under the agreement and whether there has been a breach so as to justify repossession. Where the right to repossess is addressed by the contract between the creditor and the tribal member, "the court shall apply the terms of that contract unless they are unconscionable or contrary to law." § 4. The court's decision must be rendered within 24 hours of the hearing, and if the petition for repossession is granted, the court's order may be executed by the petitioner or a Navajo Police Officer. § 8.

Section 608 of the Navajo Tribal Code provides that any person who willfully violates Section 607—*i.e.*, who resorts to self-help repossession without either the written consent of the tribal member or order of the Tribal Court—may be excluded from land subject to the jurisdiction of the Tribe. In addition, any business whose employees are found to be in willful violation may be denied the privilege of doing business on land subject to the jurisdiction of the Tribe. 7 N.T.C. § 608. Any person or business who violates the provision also "is deemed to have breached the peace of the lands under the jurisdiction of the Navajo Tribe, and shall be civilly liable to the purchaser for any loss caused" (7 N.T.C. § 609; Pet. App. 4 n.1). If the personal property repossessed consists of consumer goods, the purchaser has a right to recover an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price. 7 N.T.C. § 609. The latter measure of the minimum amount of damages available is identical to that in Section 9-507(1) of the Uniform Commercial Code (U.C.C.) (1971) for situations in which a secured creditor does not follow applicable procedures for protecting his interest in the

collateral. That measure of damages in the U.C.C. in turn has been adopted by Arizona (Ariz. Rev. Stat. Ann. § 44-3153 (1967)) and by New Mexico, the other State in which the Navajo Reservation principally lies (N. M. Stat. Ann. § 55-9-507 (1978)).

2.a. Despite the explicit prohibition in the Navajo Tribal Code, petitioner apparently for some time has repossessed approximately 10 vehicles per month belonging to members of the Navajo Tribe and located on the Reservation, without obtaining either the written consent of the owner of the property or an order from the Navajo Tribal Court authorizing the repossession. Pet. 3; Pet. App. 3, 26 n.2.[3] In 1980, petitioner's agents entered the Reservation and repossessed vehicles belonging to Tom and Lorraine Sellers and Barney and Alice Joe, members of the Navajo Tribe, without complying with the requirements in Section 607 of the Tribal Code. The Sellers and Joes brought an action for damages in Navajo Tribal Court pursuant to Section 609 of the Tribal Code, and the court awarded damages in the amount of $476.75 to the Sellers and $4,455.75 to the Joes. The Navajo Court of Appeals affirmed the damage awards. Pet. App. 4 & n.2.

b. Petitioner then brought this action in the United States District Court for the District of Arizona challenging the sections of the Tribal Code that govern repossession from Indians on the Reservation and provide civil remedies for violations. The district court held that the Tribe had inherent sovereign power to apply its prohibition against self-help repossession to

---

[3] Petitioner acknowledges these two alternative ways to accomplish repossession under the Tribal Code, but does not suggest that it attempted to comply with either in making the repossessions. See Pet. 3.

petitioner and that this power was not divested by the Treaties between the United States and the Navajo Nation (Pet. App. 36-47). However, the court held that the liquidated damages provision in 7 N.T.C. § 609 is invalid insofar as it applies to repossessions that were justified and would have been authorized by the Tribal Court if the creditor had resorted to that process, because, in the court's view, the damage remedy "overestimates" the value of the procedural protection in such circumstances (Pet. App. 48-50).

c. The court of appeals affirmed the district court's holding that the Tribe retained its sovereign power to apply its repossession statute to a non-Indian who entered onto the Reservation, but it reversed the district court's holding invalidating the provision in 7 N.T.C. § 609 for recovery of a minimum amount of civil damages (Pet. App. 1-24).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court, another court of appeals, or a state court. Nor does this case raise any issue of general importance warranting further review.

1. As an initial matter, it is important to put the issues presented in their proper perspective, because petitioner has greatly exaggerated the nature of the Tribe's action here.

a. The Navajo Tribe has not impaired or "unilaterally altered" the obligations of its members under contracts entered into with petitioner or erected a barrier behind which tribal members may hide from their contractual responsibilities, as petitioner repeatedly suggests (Pet. 9, 14-16, 19-20, 21, 22). To the contrary, the Tribal Court rule implementing Sec-

tion 607 of the Tribal Code makes clear that the substantive terms of the member's contract are to be given effect and that where the contract addresses the remedy of repossession, the court shall not deny that remedy except in circumstances that are unconscionable or contrary to law. Tribal Ct. R. §§ 4, 8.[4] Thus, the Navajo Tribal Code explicitly *preserves* the right of a creditor to retake possession of collateral upon default, and simply establishes a procedure for exercising that right on the Reservation. Moreover, the provisions of the Tribal Court rule that we have described above (see pages 2-4, *supra*) on their face provide a fully adequate and expeditious means by which petitioner can effect the repossession of the vehicle of a defaulting tribal member on the Navajo Reservation if the member does not give his written consent. Petitioner has not shown that these provisions are inadequate in practice, and indeed there is no indication that petitioner has ever sought to invoke them.

The established procedures have, however, been widely utilized by other creditors. We have been informed by the Department of Justice of the Navajo Nation that 353 petitions for repossession were disposed of by the Tribal Courts between October 1981 and September 1982 and that an addiitonal 375 petitions were disposed of during the year ending September 30, 1983. We have been further informed by

---

[4] In light of the detailed provisions of the Tribal Court rule and the explicit requirement that contract terms be enforced, petitioner's contention (Pet. 23) that the procedures for repossession under 7 N.T.C. § 607 (Pet. App. 4 n.1) are vague and standardless is wholly without merit. This Court cannot fairly assume that these procedures are applied in an arbitrary and capricious manner, and petitioner offers nothing to support its speculative assertions about the potential for such application (see Pet. 23).

the Navajo Department of Justice that resort to tribal procedures in this fashion often prompts an arrangement by which the tribal member can become current in his payments, thereby serving the interests of debtor and creditor alike. It may also be that repossessions have been accomplished without resort to judicial process by obtaining the written consent of the purchaser, as also is permitted by the Tribal Code. There is no reason to believe that petitioner will suffer any substantial hardship if it, too, follows the procedures that have been prescribed by the Tribe for the recapture of property sold to tribal members who have failed to make payment.

Petitioner does not and could not maintain that if it sold a vehicle to a person who resided in or moved to another State in which the legislature had enacted a similar statute barring nonconsensual self-help repossessions, such as Wisconsin (Wis. Stat. Ann. §§ 425.206, 425.305 (West 1974 & Cum. Supp. 1983); see Br. in Opp. 5), either the terms of petitioner's individual contracts or Arizona law would give it a right to violate that State's law and retake possession of the vehicle through the exercise of self-help. There is no reason for a different result as regards a vehicle within the Navajo Reservation and belonging to a member of the Navajo Tribe.

Moreover, in this case, the relevant provision of the Tribal Code has been in effect since 1968 (Pet. App. 3), presumably long before petitioner entered into any of its currently outstanding contracts with tribal members. Those contracts necessarily were entered into against the background of the Tribal Code—which therefore must be regarded as part of the contracts insofar as they contemplate repossession on the Reservation (*Home Building & Loan Ass'n* v. *Blais-*

*dell*, 290 U.S. 398, 429-430 (1934))—and there accordingly is nothing unfair about application of that preexisting prohibition to the contracts. See *e.g.*, *Texaco, Inc.* v. *Short*, 454 U.S. 516, 531 (1982). Certainly the fact that petitioner may have regularly repossessed vehicles in disregard of the Tribal Code for a number of years prior to 1981 did not give it a prescriptive right to continue to do so.

In any event, the result would not be otherwise even if the Tribe had enacted the special repossession procedures after the contacts in question had been entered into. "Contractual arrangements remain subject to subsequent legislation by the presiding sovereign." *Merrion* v. *Jicarilla Apache Tribe*, 445 U.S. 130, 147 (1982). See also *Home Building & Loan Ass'n* v. *Blaisdell*, *supra*. In this case, the "presiding sovereign" as regards matters on the Navajo Reservation is the Navajo Tribe, and the Tribe's statute that reasonably regulates the procedures for pursuing the remedy of repossession minimally burdens contractual rights and clearly may be applied to existing contracts. *Texaco, Inc.* v *Short*, 454 U.S. at 531; *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 20-21 n.17 (1977); *City of El Paso* v. *Simmons*, 379 U.S. 497, 503-509 (1965). In *Merrion* v. *Jicarilla Apache Tribe*, the Court declined to find that the Tribe had divested itself of its sovereign power to tax by entering into lease contracts with non-Indians that permitted them to enter onto tribal lands and extract oil and gas. 455 U.S. at 146-148. *A fortiori*, as the court of appeals held (Pet. App. 10-11), the contracts entered into by individual Indians did not divest the Navajo Tribe of its sovereign power to maintain the peace, protect the health and welfare of its members, and exclude non-Indians from its Reservation. Peti-

tioner's rights to enter the Reservation at all times remained subject to restriction by the Tribe, and petitioner "cannot remove them from the power of the [Tribe] by making a contract about them." *Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.*, No. 81-1370 (Jan. 24, 1983), slip op. 10 (quoting *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 357 (1908)).

b. Petitioner also considerably overstates the supposed conflict between the provisions of the Tribal Code and those of Arizona law and the U.C.C. upon which it relies. Under Arizona law, as under the U.C.C. (§ 9-503) and the law of most states, repossession without resort to judicial process is permissible only "if this can be done without breach of the peace" (Ariz. Rev. Stat. Ann. § 44-3149 (1967)). Thus, as petitioner concedes (Pet. 21), neither Arizona law nor petitioner's individual contracts grant it an *absolute* right to repossess a vehicle by self-help, and a violation of the breach-of-the-peace limitation would render the repossession invalid and would subject petitioner to liability for damages in the same amount that is available under the Tribal Code (Ariz. Rev. Stat. Ann. § 44-3153 (1967)).

Nor has the breach-of-the-peace limitation been construed narrowly to include only instances of actual violence, as petitioner appears to contend (see Pet. 20-21, 22). It ordinarily is sufficient if the creditor's conduct carries with it the *potential* for a disturbance, and in many jurisdictions the creditor may not repossess the property if the purchaser or a third party objects. See generally Mikolajczyk, *Breach of Peace and Section 9-503 of the Uniform Commercial Code—A Modern Definition for an Ancient Restriction*, 82 Dick. L. Rev. 351, 355-370

(1977); Note, *Commercial Law* 22 Ariz. L. Rev. 109, 110-111 (1980). See, *e.g.*, *Rogers* v. *Allis-Chalmers Credit Corp.*, 679 F.2d 138, 141 (8th Cir. 1982); *Wade* v. *Ford Motor Credit Co.*, 8 Kan. App. 2d 737, 668 P.2d 183, 187-188 (1983); *Deavers* v. *Standridge*, 144 Ga. App. 673, 242 S.E.2d 331, 333 (1978). Indeed, in Arizona, whether a breach of the peace has occurred has been held to turn upon whether the creditor entered upon the premises of the debtor and whether the debtor or a third party acting on his behalf consented to the entry and repossession. *Walker* v. *Walthall*, 121 Ariz. 121, 122, 588 P.2d 863, 864 (Ct. App. 1978).

The Navajo Tribal Code implements these principles. Like Arizona law and the U.C.C., it does not require resort to judicial process in all circumstances. Repossession is permissible with the written consent of the purchaser, in which event the written consent constitutes an objective indication that there is no dispute between the parties and resulting potential for a disturbance. In this sense, the Tribe's consent requirement is consistent with and indeed furthers the principle that repossession is barred under the breach-of-the-peace limitation if the purchaser or a third party objects to the repossession. Here, the Tribe by statute has interposed an objection to repossession if the individual Indian does not affirmatively give his consent, although the Tribe's objection may be overcome in proceedings in Tribal Court.

Moreover, the Navajo Tribe, with its special knowledge of affairs on the Reservation and the potential for disturbances there, has expressly determined that any business whose employees repossess property without obtaining the consent of the tribal member or an order of the Tribal Court is "deemed to have

breached the peace of lands under the jurisdiction of the Navajo Tribe" (7 N.T.C. § 609; Pet. App. 4 n.1). A federal court should not lightly second-guess this considered judgment by the Tribe of the measures necessary to avoid a breach of the peace. In addition, as explained above, whether repossession involves an unconsented entry onto the premises of the debtor is an important factor bearing on the validity of self-help repossession even under Arizona law. Given a Tribe's long-recognized power to exclude non-Indians from the lands it occupies and its sovereignty over its territory and members, the "premises" for purposes of this principle under the U.C.C. may properly be viewed as the Reservation as a whole, not merely the particular parcel on which the individual Indian debtor resides. The Tribal Code therefore is consistent with the broader principles governing repossession generally as applied to the special setting of an Indian Reservation.

c. Petitioner's contentions (Pet. 9, 15-16) that the decision below will undermine Indian self-determination and responsibility and adversely affect the extension of credit to Navajos and other Indians also warrant a brief response. This submission again ignores the fact that the Tribe has not barred repossession; the Tribe simply has required that repossession be accomplished in an orderly fashion. Whatever one's view of the Tribal Code provisions as a policy matter, the Tribe's freedom to implement them would appear to be the very essence of responsible self-government and self-determination. Moreover, it seems likely that the enforcement by a Tribal Court of a tribal member's contract with a non-Indian, including the ordering of repossession, would further rather than undermine a sense of individual and

tribal responsibility. In contrast, if repossession could be freely accomplished by the non-Indian creditor by means of self-help, the individual Indian and the Tribe might come to view the legal obligations of Indians to non-Indians as a matter for outsiders to resolve.

We also cannot assume that the availability or cost of credit to Navajo Indians will be substantially affected as a result of the decision below. The preamble to the rule adopted by the Tribal Court, quoted above (see pages 2-3, *supra*), expresses sensitivity to the interests of creditors and the need to assure the continued availability of credit, and it manifests a purpose to administer the repossession provisions in an inexpensive, expeditious and fair manner that will not deter creditors from doing business with Navajo Indians. And we note that numerous petitions for repossession have been filed in Tribal Court by other creditors, thereby indicating that creditors generally have not ceased doing business with Reservation Indians because of the Tribal Code provisions petitioner challenges.

In any event, even if petitioner were correct that the Tribal Code provisions might render credit somewhat more difficult or expensive for Reservation Indians to obtain, the weighing of that interest against the interests sought to be furthered by the Tribe's repossession procedures is precisely the sort of policy decision that is reserved to the Tribe as an aspect of its self-government, just as it was reserved to the Wisconsin Legislature to weigh these competing policy considerations when it enacted a similar prohibition against nonconsensual self-help repossession. Moreover, if the availability of credit in fact does become a significant problem for Navajo Indians in

the future, the political process on the Reservation might well prompt the Tribal Government to reassess the wisdom of its policy.[5] The decision below maintains that flexibility for the Tribe, and it therefore significantly furthers the federal policy of encouraging tribal self-government and self-determination.

2. Especially against the background of the foregoing discussion, it is our view that the court of appeals was clearly correct in upholding the repossession provisions of the Navajo Tribal Code.

a. The 1868 Treaty between the Navajo Nation and the United States provided that a reservation would be set aside "for the use and occupation of the Navajo tribe of Indians" and that "no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employees of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article." Treaty Between the United States of America and the Navajo Indian Tribe, June 1, 1868, Art. II, 15 Stat. 668; Pet. App. 77. With regard to this Treaty language, the Court observed in *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), that "it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the *exclusion of non-Navajos from the prescribed area* was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision" (*id.* at 174-175 (emphasis added)). In

[5] We note as well that 15 U.S.C. 1691 prohibits discrimination on the basis of race, color, or national origin with respect to credit transactions.

view of the broad treaty language and this Court's interpretation of that language, it seems clear that, notwithstanding contracts petitioner entered into with individual Indians off the Reservation, the Navajo Tribe could have excluded petitioner from entering the Reservation altogether, thereby foreclosing the possibility of repossession of vehicles that remained on the Reservation. But the Tribe has not gone that far.

The power to exclude non-Indians from a Reservation "necessarily includes the lesser power to place conditions on entry * * * or on reservation conduct" (*Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. at 144).[6] In this case, the Tribe has exercised this lesser power by permitting non-Indians to enter the Reservation in order to repossess property of defaulting tribal members upon the condition that the creditor obtain the written consent of the tribal member or an order of the Tribal Court.

b. The validity of the Tribal Code's procedural requirements as applied to petitioner's conduct on the Reservation is reinforced by this Court's decisions concerning the power of Indian Tribes to exercise civil jurisdiction over non-Indians. The Court stated in *Montana* v. *United States*, 450 U.S. 544, 565 (1981), that a tribe "may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Petitioner's "commercial dealing" and "contracts" with members of the Navajo

---

[6] See also 455 U.S. at 173 (Stevens, J., dissenting): "This 'power to exclude' logically has been held to include the lesser power to attach conditions on a right of entry granted by the tribe to a nonmember to engage in particular activities within the reservation." See also *id.* at 182.

Tribe clearly were "consensual" on petitioner's part. To be sure, the contracts in question were entered into off the Reservation, but this does not alter the *Montana* analysis. The Tribe has not sought to extend its substantive law of contract to transactions occurring outside the Reservation boundaries. The only conduct it seeks to regulate—the repossession of property belonging to Indians—occurs on the Reservation itself, and a non-Indian's entry onto the Reservation for that specific purpose itself also is consensual in nature. And of course in the present case, petitioner's contracts with tribal members necessarily were executed against the background of the Tribal Code provisions that made clear to petitioner the procedures that were to be followed if petitioner sought to repossess the vehicles on the Reservation. Because petitioner at the very least assumed the risk that it would have to comply with those procedures, the overall contractual arrangement between the parties that incorporated the potential application of tribal law accordingly was consensual in this respect as well.

In addition, the Court observed in *Montana* v. *United States* that a tribe may retain inherent power to exercise civil jurisdiction over non-members even on fee lands within its reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566. The provisions of the Navajo Tribal Code at issue here were enacted to protect the "economic security" and "health or welfare" of tribal members by requiring prior notice of a repossession, which in turn assures that a tribal member will not be stranded in a remote area of the Reservation without warning; by providing for judicial proceedings to resolve any

disputes and thereby to protect against a wrongful deprivation of property; and by preventing against a breach of the peace that could result from self-help repossessions without the debtor's consent. Pet. App. 9.

It is true that the effect of the Navajo statute is to require petitioner to pursue repossession through the Tribal Court if the Indian debtor does not consent. But "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978) (footnote omitted). The court stressed this very point with respect to Navajo courts in *Williams* v. *Lee*, 358 U.S. 217 (1959) where it observed that those courts "exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants" (358 U.S. at 222) and held that the exercise of state jurisdiction over the contract dispute there at issue "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves" (*id.* at 223). Accordingly, the provision for petitioner to seek repossession through the Tribe's own courts also is consistent with the Court's conclusion in *Montana* v. *United States* that the exercise of civil jurisdiction over non-Indians is appropriate to protect the "political integrity" of the Tribe, and indeed the Court in *Montana* cited *Williams* v. *Lee* in support of that conclusion. 450 U.S. at 566.

Nor can petitioner draw any support from the fact that Arizona law permits self-help repossession. This Court has interpreted the Navajo Treaty to provide for the exclusive sovereignty of the Navajo Tribe over the Reservation and "to preclude exten-

sion of state law * * * to Indians on the Navajo Reservation." *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. at 175. In this case, of course, the individual tribal members entered into contracts with petitioner off the Reservation, and we may assume for present purposes that for this reason, the substantive contract law of Arizona governs the interpretation of the contract and that petitioner could bring an action in Arizona state court in the event of a breach. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 149 (1973); compare *Williams* v. *Lee*, *supra*. But that is not the issue here.[7] As we have said, the Navajo Tribe has sought only to regulate the procedure by which a party may enforce its contract rights on the Reservation itself. The fact that an individual tribal member temporarily left the Reservation when he entered into the contract does not disentitle the Tribe to apply its procedural requirements in the converse situation, in which the non-Indian comes onto the Reservation. The Navajo Treaty of 1868 provides that an individual Indian forfeits his rights under the Treaty only if he "shall leave the reservation * * * to settle elsewhere" (15 Stat. 671; Pet. App. 83)—*i.e.*, if he leaves the Reservation permanently.[8] Here, however, there is no suggestion that

---

[7] There is no indication that petitioner has brought an action in state court to enforce its contracts with Navajo Indians. If it did and the state court were held to have jurisdiction, the Navajo Tribal Courts presumably would respect the state court judgment if petitioner sought to execute that judgment on the Reservation.

[8] The excerpts from the unpublished transcripts of the sessions at which the Treaties were negotiated, relied upon by petitioner (Pet. 28-29), likewise refer to situations in which an Indian has left the Reservation permanently.

the Navajo Indians from whom petitioner repossessed vehicles had left the Reservation permanently and settled elsewhere.

Finally, petitioner's objections to the Tribal Court's award of damages against it for the wrongful repossession of the vehicles are insubstantial and do not warrant review. The application of the particular section of the Tribal Code providing for the award of damages is simply an incident of the broader application to petitioner of the Tribe's prohibition against self-help repossession. As we have explained, application of that prohibition is fully consistent with legal principles governing jurisdiction over Indian matters. The measure of damages under the Tribal Code in the event of a wrongful repossession is the same as that available under state law (Ariz. Rev. Stat. Ann. § 44-3153), and therefore cannot be regarded as an aberrational provision to which it would be unfair to subject a non-Indian. In addition, the availability of such a remedy is necessary to provide compensation for victims of wrongful repossessions[9] and at the same time to enforce the substantive prohibition, which otherwise might be violated with impunity. In any event, the narrow issue of the authority of the Tribal Court to award damages in these circumstances would not appear to be one of continuing importance. The court of appeals has held that the Tribe's procedures gov-

[9] We note that petitioner itself persuaded the Arizona Court of Appeals, on conflict of laws grounds, not to permit a member of the Navajo Tribe to bring an action in *state* court to recover damages under 7 N.T.C. § 609 for a wrongful repossession in violation of 7 N.T.C. § 607, Pet. App. 4 n.1. See *Brown* v. *Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689 (1977). Petitioner's protestations regarding the suitability of the Tribal Court—the only forum remaining—for the award of damages therefore do not come with especially good grace.

erning repossession on the Reservation must be followed by petitioner. We must assume that petitioner henceforth will adhere to its obligation to do so, thereby obviating any occasion for a tribal member to seek damages in the future.[10]

---

[10] As respondents explain (Br. in Opp. 8-10), the cases upon which petitioner relies (Pet. 9-12) are not in conflict with the decision below. For example, in *Brown* v. *Babbitt Ford, Inc.*, 117 Ariz. 192, 571 P.2d 689 (1977), the Arizona Court of Appeals declined to consider the validity of the Tribe's repossession statute, the authority of a Tribal Court to award damages under it, and the authority of the State to impose its law on the Navajo Reservation. It simply declined to entertain a damages action on conflict of laws grounds. 117 Ariz. at 194 n.2, 198-199, 571 P.2d at 692 n.2, 695-696. In *Little Horn State Bank* v. *Stops*, 170 Mont. 510, 555 P.2d 211 (1976), cert. denied, 431 U.S. 924 (1977), the Montana Supreme Court sustained the writ of execution issued by a state court and levied by the sheriff by means of the garnishment of the wages of an Indian on the reservation to enforce a judgment in an action on a contract entered into off the reservation. In this case, of course, petitioner did not bring an action in state court; it resorted to self-help. Moreover, in the *Little Horn State Bank* case, the court expressly relied upon the absence of any tribal mechanism for enforcement of the state court judgment (555 P.2d at 213-214); here the Navajo Tribe has enacted a mechanism for repossession. In *Duluth Lumber & Plywood Co.* v. *Delta Development, Inc.*, 281 N.W. 2d 377 (Minn. 1979), the court sustained state court jurisdiction over a breach-of-contract suit against an Indian Housing Authority because, the court held, the transaction was not confined to the reservation. *Id.* at 382-383. In this case, in contrast, the question whether a state court would have jurisdiction over a suit by petitioner against an Indian debtor simply is not involved. In addition, Minnesota, unlike Arizona, has accepted jurisdiction under Public Law 280. See 281 N.W. 2d at 382-383.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

F. HENRY HABICHT II
*Assistant Attorney General*

LOUIS F. CLAIBORNE
*Deputy Solicitor General*

EDWIN S. KNEEDLER
*Assistant to the Solicitor General*

MARCH 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 434958 286